88-423

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MAYFAIR CONSTRUCTION COMPANY,

Petitioner,

V.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.. Whether an interim federal procurement regulation and government contract clause, in effect when a government contract is issued, are still enforceable after they have been repudiated and retracted by the regulating agency as contravening the statute they were to implement (i.e., the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (1982) (the "CDA")).

2. Whether the CDA requires that a government contract claim be "in dispute" in order to qualify as a "claim," under that Act.

LIST OF PARTIES

Mayfair Construction Company and the United States were the only parties to this case in the United States Court of Appeals for the Federal Circuit, and before the Armed Services Board of Contract Appeals.

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IN THE

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OCTOBER TERM, 1988

MAYFAIR CONSTRUCTION COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mayfair Construction Company ("Mayfair"),[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered on March 9, 1988, in a cause

1. Rule 28.1 listing of all parent companies, subsidiaries and affiliates: None.

there entitled Mayfair Construction Company, Appellant v. The United States, Appellee, No. 87-1251 in that court, which affirmed a decision of the Armed Services Board of Contract Appeals ("ASBCA") in Appeal of Mayfair Construction Company, ASBCA No. 30800, 87-1 B.C.A. (CCH) ¶ 19,542, denying Mayfair's appeal on a claim under Section 12 of the CDA. Mayfair's Petition for Rehearing With Suggestion for Rehearing In Banc was denied by the United States Court of Appeals for the Federal Circuit on June 9, 1988.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit, by 2 to 1 majority decision of a three-judge panel, reported at 841 F.2d 1576, affirmed an earlier decision of the Armed Services Board of Contract Appeals ("ASBCA"), reported at 87-1 B.C.A. (CCH) ¶ 19,542, which likewise was a split decision, of a 3 to 2 majority. Copies of the majority and dissenting opinions in both the Court of Appeals and the ASBCA are set forth in the

Appendix hereto. (See Appendix ("App.") 3, 12, 41 and 66).

JURISDICTION

The decision of the Armed Services Board of Contract Appeals was dated December 23, 1986. (App. 41) An appeal from that decision was taken to the United States Court of Appeals for the Federal Circuit. The judgment of the Court of Appeals was dated March 9, 1988 and was entered on that day. (A copy of the Notice to Counsel regarding such judgment issued by that court is set forth in the Appendix. See App. 1.) Subsequently, Mayfair filed a Petition for Rehearing With Suggestion for Rehearing In Banc, which Petition and Suggestion were both denied by the United States Court of Appeals for the Federal Circuit on June 9, 1988. (Copies of the orders containing those denials are set forth in the Appendix. See App. 37 and 39.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982), and Rules 20.2 and 20.4 of

the Revised Rules of this Court, effective from June 30, 1980, as amended to May 1, 1987.

FEDERAL STATUTE AND REGULATIONS INVOLVED

Involved in this case are the following federal statutes and regulations:

1. The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383-2391 (1978) (amended 1982), 41 U.S.C. §§ 601-613 (1982) ("CDA") which provides, in pertinent part, as follows:

> Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to Section 6(a) from the contractor until payment thereof. . . .

41 U.S.C. § 611 (1982).

2. Interim Regulations promulgated by the Office of Federal Procurement Policy (OFPP), 44 Fed. Reg. 12519-12524 (1979). A copy of the relevant portions of those Interim Regulations is appended hereto. See App. 84.

3. Final OFPP Regulations under OFPP Policy Letter 80-3, 45 Fed. Reg. 31035-31037 (1980). A copy of the relevant portions of those Final Regulations is appended hereto. See App. 90.

STATEMENT OF THE CASE

This Petition seeks review of a reported decision of the United States Court of Appeals for the Federal Circuit regarding remedies afforded to Government contractors under a basic federal procurement statute, the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (1982) (the "CDA"). The case originated as an appeal by petitioner, Mayfair, to the Armed Services Board of Contract Appeals ("ASBCA") from a decision of a Department of Defense Contracting Officer. That decision denied Mayfair's claim for interest on costs claimed under a federal Government contract which had been terminated for the Government's convenience. The ASBCA, by a 3 to 2 majority, denied Mayfair's appeal. The United States Court of Appeals for the

Federal Circuit, by a 2 to 1 majority panel decision, affirmed the ASBCA ruling. Dissenting opinions were filed in both the ASBCA and the Court of Appeals.

The ASBCA majority opinion (App. 41) held that Mayfair's termination settlement proposal did not constitute a "claim" under the CDA (i.e., a claim to which remedies under the CDA would apply, including interest under Section 12 of that statute, 41 U.S.C. § 611 (1982)), because it was not "in dispute." The ASBCA majority took the position that the CDA itself requires claims to be "in dispute" before they can be considered "claims" under that Act -- a position which was admittedly contrary to that previously espoused by two other major federal boards of contract appeals.[2]

In contrast, the Court of Appeals majority opinion (App. 3) held Mayfair's

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2. See R.G. Beer, Eng BCA No. 4885, 85-2 B.C.A. (CCH) ¶ 18,162; Tera Advanced Services, GSBCA No. 7109, 85-2 B.C.A. (CCH) ¶ 17,941.

termination proposal not to be a CDA "claim" solely on the basis of a regulatory clause promulgated by the Office of Federal Procurement Policy ("OFPP") on an interim basis and incorporated by reference into Mayfair's contract, a clause which defined the term "claim" for CDA purposes to be one "which is in dispute." The Court of Appeals majority chose not to rule on whether the Act itself required "claims" to be "in dispute."[3] Senior Circuit Judge Bennett, in a dissenting opinion (App. 12), posited that coverage of the CDA was not intended to be restricted to claims which develop into "disputes."

Petitioner filed with the Court of Appeals a Petition for Rehearing with Suggestion For Rehearing In Banc, arguing that the Court's majority opinion violated precedent

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3. The Court of Appeals likewise avoided dealing with that issue directly in an earlier case. See Esprit Corp. v. United States, 6 Cl.Ct. 546 (1984), aff'd, No. 85-996, Slip op. (Fed. Cir. July 30, 1985).

before this Court which requires rejection of regulations and clauses found to be inconsistent with the purposes underlying the statutes they are to implement. The Petition and Suggestion were both denied. Two Circuit Judges took exception to these denials. (See App. 37 and 39).

REASON FOR ALLOWING THE WRIT

This case merits this Court's review for the following special and important reason:

The Court Of Appeals Decided A Federal Question In A Way Which Conflicts With Applicable Decisions Of This Court: The Decision Below Suggests That Substantive Rights Afforded Under A Government Procurement Statute May Be Undermined By Executive Agency Regulations And Boilerplate Contract Clauses Repudiated By The Agency As Contravening The Statute

The Court of Appeals majority here has given effect to an interim regulation and contract clause which the regulatory agency itself (the OFPP) repudiated and retracted because they were inconsistent with the purposes of the Act which they were intended to implement, the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (1982)

(the "CDA"). See App. 19-20, Dissenting Op. of Bennett, J. This Court has long recognized that "administrative constructions" of statutes must be rejected whenever they are "inconsistent with the statutory mandate" or "frustrate the policy that Congress sought to implement." Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981) (and cases cited therein).

In essence, the Court of Appeals majority here indicates that it does not matter whether the statute itself was intended to limit CDA "claims" to those "in dispute," so long as the parties "agreed" to so limit CDA coverage by way of a contract provision defining the term "claim" in that manner.[4] For the reasons cogently presented

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4. The Court of Appeals majority opinion states in this regard:

> If we were to decide that the CDA does not require a dispute, this would not mean that the CDA prohibits the parties from agreeing to

[Footnote continued on next page]

in the dissenting opinion of Senior Circuit Judge Bennett (see App. 12), the OFPP Interim Regulations, 44 Fed. Reg. 12519-12524 (1979) and "Disputes" clause set forth therein (hereinafter the "interim 'Disputes' Clause"), when defining the term "claim" for CDA purposes as only a claim "which is in dispute," were clearly inconsistent with the CDA, because Congress never intended to limit coverage of that Act and the remedies afforded thereunder to claims that the Government chooses to dispute. Indeed, the plain language of the Act clearly indicates that it was intended to cover all Government contract claims, App. 70-71, ASBCA No. 30800, dissenting op. of Duvall, A.J. Any regulation which imposes as a pre-condition to contracting with the

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[Footnote continued from previous page]

> such a requirement, and there is nothing in the language of the CDA to suggest such a prohibition.

App. 9-10, Majority Op. (underscoring in the original.

Government the inclusion of a mandatory contract clause which would restrict that coverage to "disputed" claims would most certainly frustrate and undermine the statutory mandate and policies which Congress sought to implement when enacting the CDA. Such a regulation and clause must therefore be rejected. See Federal Election Commission, 454 U.S. at 32. Thus, the Court of Appeals was plainly and palpably wrong in enforcing and giving effect to the interim regulations and "Disputes" clause, which the OFPP itself deemed improper "administrative constructions" of the CDA.

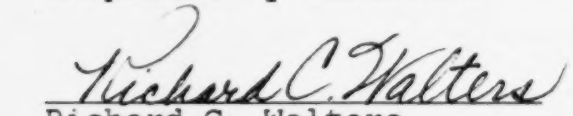
There are broader implications of the Court of Appeals majority decision here. It suggests that any substantive rights offered to a class of persons by a Government procurement statute may be undermined by an executive agency regulation imposing on contractors boilerplate Government contract clauses which contravene the statutory intent. The import of the Court of Appeals majority opinion is that an executive agency

may obtain through such clauses a contractor's "agreement" to limit or waive rights and remedies expressly granted by Congress under a statute, unless the statute itself expressly "prohibits" such an "agreement." Unless this Court reviews and rejects such reasoning, procurement regulations and clauses promulgated by an executive agency at the time of a federal contract solicitation will be given effect regardless of whether such regulations or clauses are subsequently repudiated by the agency as frustrating the purposes of the statute they were intended to implement. Without this Court's intercession, the Court of Appeals decision here would confer upon executive agencies the power to circumvent the will of Congress at any time, by the mere insertion of boilerplate contract clauses which contractors are powerless to change. See App. 23, Dissenting Op. of Bennett, J.; citing R.G. Beer, Eng BCA No. 4885, 85-2 B.C.A. (CCH) ¶ 18,162 at 91,199.

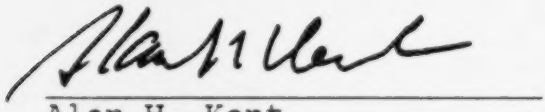
CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted



Richard C. Walters



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

NOTICE TO COUNSEL

The Court today announced its decision in the attached appeal or appeals.

A copy of the Court's opinion or opinions is enclosed, and judgment thereon has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered (by Petitioner or Respondent) as provided by Rule 39, Federal Rules of Appellate Procedure.

If sanctions have been imposed, please make check payable to the U.S. Treasury and forward same to the opposing attorney of record.

Very truly yours,

Francis X. Gindhart, Clerk

By Spencer C. Greene
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1251

MAYFAIR CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

Richard C. Walters, Schnader, Harrison, Segal & Lewis, of Washington, D.C., argued for appellant. With him on the brief was Alan H. Kent.

Carolyn E. Galbreath, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With her on the brief were Richard K. Willard, Assistant Attorney General, David M. Cohen, Director and Thomas W. Petersen, Assistant Director. Also on the brief were Larry W. Mohl and Michael S. Moran, Defense Logistics Agency, of St. Louis, Missouri, of counsel.

Appealed from: Armed Services Board of Contract Appeals

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1251

MAYFAIR CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: March 9, 1988

Before MARKEY, Chief Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

BISSELL, Circuit Judge.

Mayfair Construction Company (Mayfair) appeals from a decision of the Armed Services Board of Contract Appeals (ASBCA), Mayfair Construction Co., ASBCA NO. 30800, 87-1 BCA ¶ 19,542, denying Mayfair's appeal. We affirm.

BACKGROUND

On September 5, 1980, the Department of the Air Force awarded a contract to Mayfair for the "Pacer Down" facilities restoration

project at McConnell Air Force Base, Kansas, in the amount of $4,176,296. This contract incorporated by reference the March 1979 version of the Defense Acquisition Regulation Disputes clause.

On January 28, 1982, the contracting officer terminated the contract for the convenience of the government. Mayfair submitted a termination settlement proposal to the contracting officer on June 17, 1982, in the amount of $990,937.29. By letter of August 2, 1982, Mayfair's counsel denominated the June 17, 1982 proposal as a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 et. seq. (1982), and enclosed certification of the proposal as a claim.

On December 11, 1984, Mayfair forwarded an updated termination settlement proposal to the contracting officer in the amount of $610,172, and certified this proposal as a claim under the CDA. The proposal included a request for interest from August 2, 1982, to

December 10, 1984, in the amount of $146,612.12.

On February 14, 1985, the parties entered into a termination supplemental agreement under which they agreed that the government would pay Mayfair $438,346 for its termination costs. This agreement, however, expressly reserved Mayfair's claim for interest. On the same date, the contracting officer issued a final decision denying Mayfair's claim for interest. Thereafter, Mayfair appealed to the ASBCA, which held that the Disputes clause of the contract defined "claim" to require the existence of a dispute; no dispute existed between the parties, therefore no claim existed; and consequently, no interest would be allowable under the CDA where there was no claim.

ISSUES

1. Whether Mayfair's termination settlement proposal constitutes a claim.

2. Whether Mayfair may recover interest on its termination settlement proposal.

OPINION

I.

The contract at issue specifically incorporated by reference the March 1979 version of the Disputes clause. That clause defined claim as follows:

> (b) "Claim" means:
>
> (1) a written request submitted to the Contracting Officer;
>
> (2) for payment of money, adjustment of contract terms, or other relief;
>
> (3) which is in dispute . . . .

44 Fed. Reg. 12,524 (1979) (emphasis added). It is beyond cavil that under this clause, no claim exists unless it involves a dispute.

As a matter of fact, the ASBCA found here that no dispute existed between the parties. It looked to Mayfair's substantial concurrence with an August 1982 government audit report, and the large reductions Mayfair made there-

after in its proposed settlement. It noted that excluding the $146,612.12 interest element of Mayfair's December 1984 settlement proposal, the final settlement agreement for $438,346 gave Mayfair only $25,213.88 less than the $463,559.88 it had requested in December 1984. As a result, the ASBCA characterized Mayfair and the government during this period as being in "a pre-dispute, negotiation posture." Mayfair, 87-1 BCA at 98,744.

We must treat the ASBCA's factual findings as final unless "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith," or unless those findings are "not supported by substantial evidence." 41 U.S.C. § 609(b) (1982). There is nothing here to suggest these findings are fraudulent, arbitrary, capricious, or grossly erroneous. With respect to the substantial evidence standard, this "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National

labor Relations Bd., 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 229 (1938)). In our view, a reasonable fact-finder could have found as the ASBCA did. Therefore, we hold that the ASBCA's conclusion that no dispute existed between Mayfair and the government is supported by substantial evidence. Under the terms of the controlling contractual provision, consequently, Mayfair's termination settlement proposal did not constitute a claim.

Mayfair attempts to resist this result with two arguments. First, Mayfair states that a revised Disputes clause that did not require a claim to be disputed superseded the March 1979 Disputes clause in Mayfair's contract. Mayfair notes that the new clause was issued on April 30, 1980, well before the award of the subject contract, on September 5, 1980. This argument, however, does not wash. The new clause applied only to contracts resulting from solicitations issued on or after

June 1, 1980. 45 Fed. Reg. 31,035, 31,037 (1980). Because the solicitation for the subject contract was dated February 17, 1980, Mayfair, 87-1 BCA at 98,741, the new clause is inapplicable.

Mayfair also contends that the CDA does not require a claim to be disputed, and as such, the terms of the Disputes clause requiring a dispute are in violation of the statute. In order to dispose of this case, we need not, and do not, decide whether the CDA requires a claim to be disputed.* If we were to decide that the CDA requires a dispute, the March 1979 Disputes clause would certainly be valid. If we were to decide that the CDA does not require a dispute, this would not mean that the CDA prohibits the parties from agreeing to such a requirement,

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* The dissent focuses on construing the CDA, and determines that the CDA does not require a claim to be disputed. The dissent's analysis, however, virtually ignores the contract clause requiring the existence of a dispute. In contrast to the dissent, we consider the terms of that clause to be dispositive.

and there is nothing in the language of the CDA to suggest such a prohibition. Thus, Mayfair's argument that the March 1979 Disputes clause is in violation of the CDA is without merit.

II

Mayfair's request for interest on its termination settlement proposals is governed by the Court of Claims decision in Nab-Lord Associates v. United States, 682 F.2d 940 (Ct. Cl. 1982). There the Court of Claims held that the CDA does not authorize an interest award unless a contractor demands interest on a claim cognizable under the CDA. Id. at 943-44. For the reasons already given, Mayfair's termination settlement proposals were not cognizable claims. Therefore, any demand for interest that relies on these proposals as the underlying basis for an interest demand must fail.

In its December 11, 1984 settlement proposal, Mayfair demanded interest on its August 2, 1982 proposal on the theory that

the earlier proposal had been properly certified as a CDA claim. However, because the earlier settlement proposal was not a claim, the demand for interest was unallowable.

Because Mayfair also certified its December 11, 1984 proposal as a CDA claim, it alleges that interest should run on the interest component of that "claim." We may dispose of this argument without reaching the broader issue of whether the CDA permits interest to run on an interest claim. Having held that the interest component of the December 1984 proposal was unallowable, no corpus remains on which interest can run. Therefore, no basis exists on which Mayfair may recover interest.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1251

MAYFAIR CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

- - - - - - - - - - - - -

BENNETT, Senior Circuit Judge, Dissenting.

I respectfully dissent. The majority concludes that substantial evidence supports the board's conclusion that no "dispute" existed between the parties since the government's final settlement payment was "only" $25,213.88 less than Mayfair's second termination settlement proposal, which had been certified as a claim pursuant to the requirements of the Contracts Disputes Act (CDA), 41 U.S.C. § 605(c)(1) (1982). That alone provides ample reason to dissent since, in my view, a disagreement over $25,213.88 is a

quite substantial and sufficient dispute, even assuming that a dispute was indeed needed for the existence of a CDA claim under the terms of the subject contract. However, the issue over the existence of a dispute is not even that close, as the evidence of dispute was far greater than a disagreement over $25,213.88.

Following the government's termination for convenience of the Mayfair contract on January 28, 1982, Mayfair submitted a termination settlement proposal in the amount of $990,937.29. On August 2, 1982, Mayfair identified and certified the settlement proposal as a claim under the CDA. Over 2 years later, in December 1984, Mayfair submitted a second certified settlement "proposal" in the amount of $463,559.88 (not including an amount claimed as interest on that figure). It was not until May 28, 1985, that the government paid Mayfair $438,346, which represented the second proposal amount minus the disputed

$25,213.88, in settlement of its termination for convenience claim.

Thus, Mayfair did not receive the government's final payment until 40 months after the government terminated the contract and the final payment received was $552,591.29 less than Mayfair's initial settlement proposal, which had been certified as a CDA claim almost 3 years before. In light of the time taken to resolve the amount due following the government's termination and the difference of over a half a million dollars between Mayfair's initial claim and the government's final payment, I do not hesitate in concluding that substantial evidence does not support the majority's (and the board's) conclusion that the initial termination settlement proposal submitted by Mayfair was merely part of the usual and ordinary process of a convenience termination, and therefore could not constitute a claim since the parties were in "a pre-dispute, negotiation posture." See

Mayfair Construction Co., ASBCA No. 30800, 87-1 BCA ¶ 19,542.

My disagreement with the majority, however, is much more fundamental than a difference of opinion over the length of time or the amount of money needed to constitute a "dispute." In my view, a contractor's certified settlement proposal following the termination of a contract for the convenience of the government is as much a claim against the government related to a contract, see 41 U.S.C. § 605(a), as more "traditional" claims stemming from such events as constructive changes, delay, or defective specifications which unquestionably are treated as claims under the CDA. Yet here the majority unjustifiably allows contractor claims arising from convenience terminations to be segregated from all other types of claims arising from contracts with the government, despite no such

distinction being made in the CDA.[1/] Not only is the majority's position without support in the clear legislative history surrounding the enactment of the CDA, but it will serve as a strong disincentive to accurate submission and good faith negotiation of termination settlement proposals by contractors and to timely and orderly consideration of termination claims by the government. At a minimum, the majority view must be seen as heralding, at least with respect to termination claims, a return of the pre-CDA days of inflated settlement proposals as precursors to bar-

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1/ See Walber Construction Co., HUD BCA No. 80-445-C2, 83-2 BCA ¶ 16,885 (concluding that the Federal Acquisition Regulations not allowing interest on amounts due under a settlement agreement arising out of a termination for convenience were supersedeed by the CDA). In fact, the board in Walber specifically noted that although a termination settlement agreement claim is intended to be negotiated rather than unilaterally decided by the contracting officer and was not therefore subject to the pressure of a right to interest for less-than-immediate payment, the CDA made no such distinction between types of claims. Id. at 84,031.

gaining and of litigation as the primary means of claim resolution.

Congress chose not to provide an express definition of "claim" in the CDA statute. But, as the dissenting board opinion in this case ably points out, there is no evidence that Congress intended "claim" to have a special meaning apart from its plain, ordinary meaning. 87-1 BCA at 98,746 (ordinary meaning of "claim" is "'a demand for something rightfully or allegedly due; assertion of one's right to something'" (citation omitted)); see also Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987); Paragon Energy Corp. v. United States, 645 F.2d 966, 971-76 (Ct. Cl. 1981); cf. In re Remington Rand Corp., No. 87-5063 (3d Cir. Jan. 6, 1988) (Congress used "claim" in the CDA in the traditional sense--as a legal cause of action). In the absence of contrary legislative history, the plain meaning of a statute should be followed. Consumer Product Safety

Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Horner v. Jeffrey, 823 F.2d 1521, 1525 (Fed. Cir. 1987). I am able to discern no congressional intent to exclude contractor claims resulting from government terminations for convenience from the provisions of the CDA. See Essex Electro Engineers v. United States, 702 F.2d 998, 1003 (Fed. Cir. 1983).[2/]

Nor is there any evidence that Congress intended "claim" to incorporate, for the purposes of the CDA, the additional requirement of a dispute. As the board dissent also correctly points out, "claim" and "dispute" were not used synonymously by

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2/ In Essex, this court allowed interest on a termination for convenience claim from the date that the claim was certified to the contracting officer. The court made no suggestion that claims stemming from the termination of a contract for the convenience of the government fell outside the terms of the CDA. In fact, the court in Essex also noted that the interest provision of the CDA superseded the interest clauses in the contracts litigated under the Act. 702 F.2d at 1003 & n.9.

Congress in the text of the CDA. See 87-1 BCA at 98,747. Furthermore, the erroneous requirement of a dispute contained in the interim 1979 regulations defining "claim," referenced in the contract at issue, was deleted from the final regulations adopted in 1980.[3/] Deference to an interpretation of an agency charged with administration of a statute is not required where that interpretation conflicts with the statutory mandate or would conflict with the policy that Congress sought to implement. E.g., Jeffrey, 823 F.2d at 1531. This would appear to be especially true where the interpretation in question has

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3/ The final regulations provided the following definition:

> (i) As used herein 'claim' means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

87-1 BCA at 98,743 (quoting 45 Fed. Reg. 31035 (May 9, 1980)). See also Paragon, 645 F.2d at 976.

been repudiated by the agency which originally proposed it. See generally R.G. Beer Corp., ENG BCA No. 4885, 85-2 BCA ¶ 18,162. In short, the unmistakable legislative intent of Congress was to provide interest on all contractor claims arising from contracts with the government, regardless of whether the claims were litigated or settled after negotiation. See 41 U.S.C. § 611; R.G. Beer, 85-2 BCA at 91,199.

In determining that no valid claim under the CDA existed in the present case, the board majority rejected the analysis of R.G. Beer and instead relied on Racquette River Construction Co., ASBCA No. 26486, 82-1 BCA ¶ 15,769. The board in Racquette River relied on a lack of a dispute and a lack of delay in settlement beyond a reasonable time to conclude that the contractor's settlement proposal following a termination for the government's convenience was not a claim. But examination of the facts indicates that the contractor submitted a claim for $91,454

and the government questioned at least $32,138 of it. Thus, the board's conclusion in Racquette River that no dispute existed appears contrived since much of the board's opinion delineates the contractor position and the corresponding government proposal, and then decides between the disputed positions. Even more curiously, the board in Racquette River had also disallowed reimbursement of attorney fees incurred in preparation of the claim against the government since "even prior to the incurrence of these fees, the conflict between the parties was disputatious and did reach the level of becoming a claim against the Government." 82-1 BCA at 78,052. In my view, Racquette River cannot be used as support for the result in this case since it contains a fundamental inconsistency in denying attorney fees due to the "disputatious" nature of the claim, yet also denying interest on the same claim because

there was "no dispute" at the time of the claim's submission.[4/]

The majority here attempts to avoid addressing the issue of whether the requirement of a dispute as a prerequisite for a claim under the CDA contravenes the statute by concluding that the CDA does not prohibit the parties from agreeing to additional requirements not expressly contemplated or provided by Congress in the statute. How-

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4/ In the present case, the government points to inconsistent assertions in Mayfair's letter containing its August 2, 1982 certification. In that letter, Mayfair attempted to draw a distinction between certification of a "claim" under the CDA sufficient to start the time for interest and a "prosecuted claim" for which recovery of legal fees associated with negotiation of a settlement proposal would not be reimbursed by the government. The government argues that Mayfair's attempted distinction between "CDA claim" and "prosecuted claim" shows that Mayfair's settlement proposal was not a claim, despite the certification. Rejection of Mayfair's attempted distinction may indicate that by electing to certify its claim under the CDA, Mayfair correspondingly ended any possible entitlement to reimbursement for subsequent attorney fees associated with settlement negotiations concerning the claim, but it is not determinative as to whether its initial proposal should be considered a CDA claim once certified.

ever, the clear intent of Congress should not be permitted by this Court to be sidestepped so easily by the parties. It is quite doubtful that Congress intended, as the majority allows here, for the parties to create a different definition of claim in every contract involving the government, especially since the government is the party which provides that definition through its regulations governing its procurement process. As was observed by the board in R.G. Beer,

> [i]t would indeed be ironic if, by simply publishing a new and self-serving definition of the familiar term "claim," one of the contracting parties could regain its superior bargaining power and turn the event selected by Congress to "provide a specific date from which interest will be paid" into a variable date, and the benefit intended to "serve as an incentive" for early submission of claims into a disincentive to early claim submittal or settlement.

85-2 BCA at 91,199.

The CDA was designed to end the prior practice rampant in the government contracting area where a contractor would submit grossly

inflated claims that had little relation to the facts, were improper as a basis for settlement, and were intended only as a starting point for bargaining. See Fidelity Construction Co. v. United States, 700 F.2d 1379, 1382-83 (Fed. Cir.) (citing legislative history of the CDA), cert. denied, 464 U.S. 826 (1983). To treat termination for convenience settlement proposals differently from other claims related to contracts and to ignore or prevent their certification as CDA claims encourages a return to submission of inflated proposals as a precursor to bargaining and contradicts the entire purpose of the CDA. This is not the type of negotiation posture intended by Congress or that should be encouraged by this court.

The legislative purpose behind 41 U.S.C. § 611, the interest provision in the CDA, adds further support for this conclusion. As discussed in Fidelity, 700 F.2d at 1384, Congress was concerned with fully compensating contractors for additional costs incurred in

continuing performance under a contract. See also 87-1 BCA at 98,747. In the case of termination for convenience, the contractor's work may have been terminated prior to his receiving adequate compensation for the performance already completed. No interest is allowed for the time during which the contractor prepares the termination claim prior to its submission and certification. Allowing interest to accrue from the time that a contractor claim related to a contract is certified comports with congressional intent in providing adequate compensation to the contractor on its claims which are upheld. Furthermore, treating termination settlement claims no differently from other claims requires, through contractor compliance with the CDA certification provisions, the submission of good faith claims with accurate and complete supporting data, which facilitates the orderly resolution of any quantum due as a result of the termination. See 41 U.S.C. § 605(c)(1);

see also United States v. Turner Construction Co., 827 F.2d 1554, 1561 (Fed. Cir. 1987).

The CDA interest provision also serves to provide "an additional inducement for the settlement of claims short of litigation." Brookfield Construction Co. v. United States, 661 F.2d 159, 164 (Ct. Cl. 1981). It makes little sense to say that termination settlement claims should not be treated as claims under the CDA because they are merely in the predispute posture of negotiation, since a purpose of the CDA is to facilitate the settlement of claims short of litigation. Maintenance of a predispute posture should be encouraged, not penalized. Requiring a dispute before interest can accrue pushes the parties that much closer to litigation and only serves to encourage "creation" of a dispute in order to permit the payment of interest. If all other claims arising from contracts with the government currently handled under the CDA can be settled short of litigation, and that is the clear intent and

purpose of the statute, it does not follow that treating settlement proposals in the same manner would somehow lead to a different result.

Allowing interest to contractors on their claims under the CDA was intended by Congress to make the bargaining process more equal so that the government could not unreasonably delay the claim analysis to the contractor's detriment. Since other types of CDA claims (not involving fraud) can be negotiated and settled, the fact that termination claims have historically been negotiated rather than merely granted or denied by the contracting officer is no reason to treat termination settlement claims differently from other claims under the CDA. Thus, I would conclude that a contractor should be able to elect to certify its settlement proposal as a CDA claim following a termination for the convenience of the government. Since Mayfair did exactly that, and there has been no suggestion that its initial certification was otherwise

defective, I would conclude that Mayfair's termination settlement proposal was a valid CDA claim from August 2, 1982, the date on which the claim was validly certified in accordance with the CDA.

This court has held that a contractor can recover CDA interest even where the underlying quantum claim has been settled as long as the quantum claim was subject to the act and the settlement agreement did not extinguish the interest claim. ReCon Paving, Inc. v. United Statees, 745 F.2d 34 (Fed. Cir. 1984). Since, unlike the majority, I would conclude that appellant's certified termination settlement proposal was a cognizable claim under the CDA and since the parties specifically excluded Mayfair's claim for interest from their settlement agreement, I would conclude that Mayfair is entitled to interest in accordance with the terms of 41 U.S.C. § 611:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the

> contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury . . . .

According to the parties' stipulations, the total interest due on the $438,346 payment by the government for the period from the date of the initial certification of the claim, August 2, 1982, to the date of payment, May 28, 1985, would be $171,229.09. In my view, Mayfair is entitled to recover that amount.

The "Interest on Interest" Claim

In addition to the above amount, Mayfair also asserts that the interest element of its certified claim of December 11, 1984, is itself a claim under the CDA which entitles it to interest on the amount found due on that disputed claim element. In accordance with that theory, Mayfair alleges that since the CDA interest owed on the $438,346 ultimately paid amounted to $146,052 as of December 11, 1984, it is entitled to CDA interest on that

amount for the period from December 14, 1984, the date that the contracting officer received the certified interest claim, through the future date when the $146,052 is ultimately paid by the government. Although the majority does not reach the so-called "interest on interest" issue in light of its holding that no interest is to be awarded at all, I will indulge in a brief comment thereon for the sake of completeness.

As evidenced by the use of the term "shall" in section 611, the terms of the section are mandatory. When a proper CDA claim (including certification) has been filed by the contractor and an amount stemming from the claim found to be due to the contractor, the contractor is entitled to receive interest on that amount from the date that the claim was certified. E.g., Fidelity, 700 F.2d at 1385. In fact, although it is uniformly done, it does not appear that the contractor need specifically mention that it seeks interest on the underlying claims in

order to recover the interest under the statute since payment of such interest is mandatory. So, absent a dispute over whether the underlying claim is indeed a claim, payment of interest on the amount paid on the claim should necessarily follow in accordance with the statute, and the issue of additional interest on that interest does not arise.

Here, however, since there was a dispute over whether Mayfair's termination settlement proposal could be certified as a CDA claim, the issue did arise. The board in this case unanimously agreed that no interest could be paid to Mayfair on the unpaid interest because only simple interest can be awarded against the Government. See Brookfield, 661 F.2d at 170; United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1331-32 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976); Central Mechanical, Inc., ASBCA No. 29193, 85-2 BCA ¶ 18,005. However, the asserted "compound interest" in this case appears to stem from the fact that Mayfair seeks interest on an

unpaid amount which itself happens to be interest. Thus, it appears that the interest sought here is indeed simple interest rather than compound interest, albeit simple interest based on an amount which happens to be interest itself, and therefore the claim for such should not necessarly be denied on that basis.

Nevertheless, I would also hold that interest could not be recovered on the unpaid interest of $171,222.09[5/] because the underlying claim to the "interest on interest" claim, the claim for interest on the termina-

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5/ Assuming such interest recoverable, any claim for interest on unpaid interest would not actually accrue until the principal (the unpaid interest) is paid and the interest thereon is not. In this case, the alleged claim for interest on the unpaid interest accrued on May 28, 1985, so Mayfair's claim (and attempted certification thereof) for "interest on interest" made on December 10, 1984, was premature. Thus, contrary to Mayfair's alleged computation method, any additional recoverable interest should be based on the entire amount of interest owed on the settled claim ($171,222.09) from the date that the settled claim was paid but the interest was not.

tion claim, is not itself a claim under the CDA. Section 605(a) of the CDA provides that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." (Emphasis supplied.) In my view, the termination claim at issue here is a claim by a contractor against the government relating to a contract; however, the "claim" for CDA interest on that claim relates not to the contract, but to the CDA itself. Since section 611 only provides for the payment of interest on claims received pursuant to section 605(a), the limited waiver of sovereign immunity contained in the CDA does not appear to extend to the payment of interest on unpaid CDA interest. See, e.g., Soriano v. United States, 352 U.S. 270, 276 (1957) (the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"); Fidelity, 700 F.2d at 1383 (no interest shall be awarded absent

an express contractual provision or an Act of Congress specifically providing for payment).

The conclusion that a claim for interest on unpaid CDA interest is not itself a cognizable CDA claim is buttressed by the decision of the Court of Claims in Brookfield.[6/] In an extensive analysis of the CDA interest provision, the court in Brookfield made no mention of allowing additional interest on the CDA interest ultimately determined to be due. Furthermore, in reaching its conclusion, the court also held that certification of the claim for CDA interest was not necessary.

6/ In Brookfield, the court held that a contractor was entitled to recover interest on claims pending before the contracting officer on March 1, 1979, the effective date of the CDA, despite the absence of an interest provision in the contract, and awarded simple interest on the amounts of the underlying claims from March 1, 1979 through the date of payment of those claims. 661 F.2d at 168-170.

> As for the post-Act interest claim itself (distinguished from the underlying claims), no certification is necessary even though we assume arguendo that the claim was presented after March 1, 1979. Once the amounts for the underlying claims are set, the determination of the amount of post-Act interest is objective, legal, and mathematical, not lending itself to certification nor serving any of certification's fraud-preventive goals. It would be needless, redundant, and overly-technical to require certification of that interest claim.

661 F.2d at 166-67.

The holding in Brookfield that claims for CDA interest do not need to be certified is a strong indication that such interest claims, while arising from the CDA, do not arise under a contract so as to qualify as CDA claims. Thus, claims for CDA interest would not themselves be entitled to CDA interest. See Nab-Lord Associates v. United States, 682 F.2d 940, 944 (Ct. Cl. 1982) (in order for a contractor to receive interest under the CDA there must be an underlying claim for quantum which is governed by the act). Accordingly, for the reasons given, I

would affirm that part of the board's decision holding that no additional interest could be recovered under the CDA on the $171,222.09 interest on the termination claim.

NOTE: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1251

MAYFAIR CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

ORDER

A suggestion for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

Judges Smith and Newman would grant the suggestion.

FOR THE COURT:

Francis X. Gindhart
Francis X. Gindhart, Clerk

6/9/88
Date

cc: Mr. Richard C. Walters
Ms. Carolyn Galbreath, DOJ

NOTE: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

(Corrected copy)

87-1251

MAYFAIR CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

Judges Smith and Newman would grant the suggestion.

FOR THE COURT:

Francis X. Gindhart
Francis X. Gindhart, Clerk

6/9/88
Date

cc: Mr. Richard C. Walters
Ms. Carolyn Galbreath, DOJ

DECISION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS IN MAYFAIR CONSTRUCTION COMPANY

ASBCA No. 30800, December 23, 1986
Contract No. F14614-80-C-0018

Reported at 87-1 B.C.A. (C.C.H.) ¶ 19,542:

For the appellant: Schnader, Harrison, Segal & Lewis, Washington, D.C., by Harold F. Blasky and Richard C. Walters. For the government: Richard F. Pier, Trial Attorney, Defense Contract Administration Services Region, St. Louis (DLA).

Opinion by Administration Judge Ruberry with Administrative Judges Watkins and Arons concurring; Administrative Judge Duvall dissenting; Administrative Judge Harper concurred with the dissent.

[Text of Opinion]

The question presented by this appeal is whether appellant can recover interest under the Contract Disputes Act of 1978 (CDA) (41 U.S.C. § 601 et. seq.) on the amount agreed to as settlement for termination of the contract for convenience of the Government.

Appellant maintains that it is due interest on the settled amount from the time it certified the settlement proposal and labeled the proposal a claim under the CDA. The Government contends that interest is not payable for three reasons; first, because the termination settlement proposal was not a claim under the CDA since the amount was not disputed; second, because termination settlement proposals traditionally have not been considered to be claims and; third, because the termination settlement proposal was not properly certified as a claim under the CDA. The Government does not question the sufficiency of the text of the certification, but argues that the certification was ineffective because it was signed by an individual not properly authorized to certify a claim under the CDA and implementing regulations. Also at issue is appellant's contention that the claim for interest was itself a claim cognizable under the CDA, entitling it to recover interest on the interest allegedly accrued on the amount

of the settlement. There are no facts in dispute. The appeal is before the Board on the record, supplemented by a joint stipulation of facts, pursuant to Board Rule 11.

Findings of Fact

The following is a summary of the essential facts, most of which have been stipulated by the parties.

Appellant's bid on the solicitation dated 17 February 1980 for the "Pacer Down" facilities, restoration project at McConnell AFB, Kansas was signed by Mr. Phillip W. Akwa, Contract Administrator, on behalf of appellant (Stip 2).

By letter dated April 15, 1980, Mr. Paul Cocose, appellant's president, notified Air Force contracting personnel at McConnell AFB that Mr. Akwa was authorized to execute the construction contract and to negotiate and execute any modifications and time changes to that contract (Stip. 3).

On or about 5 September 1980 the contract was awarded to appellant in the amount of

$4,176,296. The contract was executed by Mr. Akwa on behalf of appellant (Stip. 4).

Mr. Akwa likewise executed many bilateral modifications to the contract on behalf of Mayfair. However, bilateral modifications Nos. 2 and 3 were executed by Mr. A. Karwat, Project Manager and Mr. Charles Whalen, Assistant Contracting Administrator, signed Mod 4 (Stip. 5).

During the course of contract performance, Mr. Akwa was Mayfair's chief representative at most meetings with Government officials concerning any matters relating to the contract (Stip. 6).

The contract was terminated for convenience of the Government on or about 28 January 1982 (Stip. 7). Subsequently, by letter dated March 17, 1982, Mr. Cocose confirmed to Government contracting officials that Mr. Akwa was continuing in his capacity as contract administrator for the project, and, as such, had full authority to bind appellant (Stip. 8).

The delegation of authority to Mr. Akwa was acknowledged by Mr. R.D. Fischer, the Government's Termination Contracting Officer ("TCO") by letter dated June 16, 1982 to Mr. Cocose. In that letter, the TCO insisted that all correspondence be signed by the contract administrator (Stip. 9).

By letter dated June 17, 1982 from Mr. Akwa to the TCO, Mayfair submitted a Termination Settlement Proposal in the amount of $990,937.29. By letter dated August 2, 1982, to the TCO, Mayfair's counsel forwarded Mayfair's certification of that proposal specifically identified as a "claim" under the CDA. That CDA certification was executed by Mr. Akwa on behalf of appellant (Stip. 10).

On January 21, 1983, the TCO was orally notified that Mr. Akwa no longer represented Mayfair and that Mr. Cocose was personally assuming Mr. Akwa's duties as contracts administrator. This notification was confirmed in writing by Mr. Cocose's letter to the TCO dated March 1, 1983. All subsequent CDA

certifications with respect to Termination Settlement Proposal updates were executed by Mr. Cocose, including settlement proposals submitted in June ($567,545) and August ($578,394) 1984. Stip. 11; R4, tab 5)

The reasons for the substantial reduction in the $990,937.29 initially proposed by appellant are not entirely clear, but the record indicates that "The contractor basically concurred" with the findings of a Government audit report issued in August 1982 (R4, tab 6).

The Termination Settlement Proposal, updated December 11, 1984, certified by Mr. Cocose as a claim under the CDA in the amount of $610,172, included as an element of Settlement Expenses in Schedule E of DD Form 541, Settlement Proposal (Total Cost Basis), a claim for CDA interest in the total amount of $146,612.12. The computation of that amount was set forth on a separate sheet attached to the Settlement Proposal form and reflected the accrual of interest (at rates promulgated

semi-annually by the United States Secretary of the Treasury for purposes of the CDA) from August 1, 1982, the date when appellant's initial CDA certification was transmitted to the TCO, until December 10, 1984 (Stip. 12; R4, tab 8).

By Termination Supplemental Agreement No. A00001 dated February 14, 1985, the parties agreed to a settlement with respect to appellant's Settlement Proposal. Expressly reserved from the Termination Supplemental Agreement was appellant's claim for interest. It was agreed that that portion of appellant's Settlement Proposal would be the subject of a unilateral determination to be issued by the TCO (Stip. 13).

By letter also dated February 14, 1985, the TCO issued a Final Decision denying Mayfair's claim for interest on that Termination Settlement Proposal. A timely appeal from that Final Decision was made by appellant's counsel by letter dated February 20,

1985 (Stip. 14). The contracting officer's denial was based on the contention that a settlement proposal is not a claim as defined in Federal Acquisition Regulations (FAR 33.001) but is a routine request for payment pursuant to the Termination Clause, and therefore interest is not payable.

The undisputed amount agreed upon under Termination Supplemental Agreement No. A00001, $438,346, was paid by the Government on May 20, 1985 and received by appellant on May 28, 1985 (Stip. 15).

The parties have agreed that the correct amount of interest, if found to be allowable, from August 2, 1982 until December 10, 1984, was $146,052 (Stips. 16 and 17).

The parties further have agreed that in the event the Board should find the contractor entitled to CDA interest on the termination settlement amount eventually determined due, that additional CDA interest would be due for the period December 11, 1984 up to and including the date of payment under Termination

Supplemental Agreement No. A00001, May 20, 1985. Such additional interest was agreed to be $25,170.09 (Stip. 18).

The contractor is also claiming interest on the interest amount of $146,052 representing the interest accruing on that amount from December 14, 1984 until payment is made by the Government of the $146,052 (Stip. 19).

The record includes an affidavit from appellant's president stating that as part of his duties he appointed Mr. Akwa as appellant's contracts administrator for the project, that Mr. Akwa was in complete control of all aspects of contract administration, including submission and negotiation of all claims on appellant's behalf and was appellant's senior official in charge of the work site until January, 1983, and that modifications 2 and 3 (Stip. 5, supra) were minor modifications signed by subordinates of Mr. Akwa under a delegation of authority from him.

Applicable Statutory, Regulatory and Contract Provisions

Under the CDA, all claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision (41 U.S.C. § 605(a)). The CDA requires the contractor to make a prescribed certification of all claims over $50,000. The CDA does not define a claim. Early in 1979, shortly after enactment of the CDA, the Office of Federal Procurement Policy (OFPP) issued interim regulations defining a "claim" as a matter in dispute and in March 1979 a Disputes Clause was promulgated utilizing that definition, 44 Fed. Reg. 12524. That clause (DAR 7-602.6), which was included in appellant's contract, stated, in pertinent part:

> Disputes. (a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.). If a dispute arises relating to the contract, the contractor may submit a claim to the

Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.318).

(b) "Claim" means:

(1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of contract terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

(c) In the case of disputes requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the Contractor shall certify, at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(Contractor's Name)_____

(Title)_____

(d) The Government shall pay the contractor interest:

(1) on the amount found due on claims submitted under this clause;

(2) at the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41;

(3) from the date the Contracting Officer receives the claim until the Government makes payment.

The definition in the final OFPP regulations issued the following year, was as follows:

(b) Definition of Claim:

(i) As used herein 'claim' means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim under Section 6(a) of the Act...

(45 Fed.Reg. 31035 dtd May 9, 1980)

The OFPP prescribed a new Disputes clause utilizing this language, and the new clause was made a part of the Defense Acquisition Regulations by the DAR council on June 25, 1980 as paragraph (c) of the clause.

Paragraph (b) of the new clause read as follows:

> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

The Federal Acquisition Regulation (FAR 33.201) uses essentially the same definition except that the FAR states that "a voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." (Emphasis added)

Section 12 of the CDA, 41 U.S.C. § 611, provides for interest on contractor claims as follows:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to Section 6(a) from the contractor until payment thereof....

Appellant points out that the contract Termination for Convenience of the Government

clause refers to the contractor's submission as a "claim", particularly in paragraph (c) thereof, to wit:

> (c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer.

The Government counters that the regulation in effect at the time of the termination here (DAR 8-213.2 (c)) expressly prohibited interest on termination for convenience settlement amounts, as follows:

> (c) Interest. No interest shall be paid by the Government on the amount due under a settlement agreement or a settlement by determination. Interest may, however, be allowed on successful contractor appeals to the contracting officer's determination in accordance with the Payment of Interest on Contractors' Claims clause in 7-104.82.

The FAR contains a substantially identical prohibition (FAR 49.112-2(d)):

> (d) Interest. The Government shall not pay interest on the amount due under a settlement agreement or a settlement by determination. The Government may, however, pay interest on a successful contractor appeal from a contracting officer's determination under the Disputes clause at 52.233-1.

The CDA does not specify who must certify a claim on a contrractor's behalf when it requires "the contractor" to certify the claim. However, both the Federal Acquisition Regulation (FAR) and its predecessor, the Defense Acquisition Regulation (DAR), furnish specific guidance in this regard.

FAR 33.207(c) provides, in pertinent part:

> (c)(2) If the contractor is not an individual, the certification shall be executed by-

(i) A senior company official in charge at the contractor's plant or location involved; or

(ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

Language identical to that in subsection (c)(2)(i) and (ii) above was previously applied in defense contracts through DAR 1-314(L)(2) and in other federal agency procurements through Paragraph 1.7 of OFPP Policy Letter No. 80-3 (45 Fed. Reg. 31,035 May 9, 1980).

DECISION

The Government's contention that the August, 1982 certification of appellant's settlement proposal was ineffective because Mr. Akwa, the individual who signed it, was not authorized to do so is not supported by the facts. Mr. Akwa executed the original contract on appellant's behalf, negotiated and executed modifications to the contract,

and administered the contract with full authority. He was the senior company official in charge of the work site until January, 1983. Consequently, under governing regulations he was authorized to execute the certification. See Transamerica Insurance Co. v. United States [32 CCF ¶ 73,012], 6 Cl. Ct. 367 (1984). There is no legal basis for the Government's contention that Mr. Akwa required a specific grant of authority from the company's Board of Directors to execute the certification and other documents for appellant.

With respect to the question of whether CDA interest on the settled amount is due appellant, we addressed the issue of whether a settlement proposal is a claim for CDA interest purposes in Racquette River Construction, Inc., ASBCA NO. 26486, 82-1 BCA ¶ 15,769. Faced with the identical Disputes clause we have in this contract, we said:

> In the instant case appellant submitted its settlement proposal in the

amount of $91,454 on 17 November 1980. At that point its proposal was, to use the terminology of the Disputes clause, "a written request ... for payment of money." However, it was neither for an amount in dispute or unresolved beyond a reasonable time, nor did appellant, at that point, demand a decision by the contracting officer. Appellant's 17 November 1980 settlement proposal was therefore no a "claim" See, R.G. Robbins Co., Inc., ASBCA NO. 26521, 7 January 1982, slip. op. at 7.

The DCAA audit report was issued on 16 January 1981. In that report, the auditor questioned costs totalling $32,138, and recommended approval of the remaining $59,316 proposed by appellant.

Following a series of unsuccessful settlement negotiations, held pursuant to the provisions of the termination for convenience clause, appellant, on 16 March 1981, requested that a contract-

ing officer's final decision be issued. On that date, having a written request for payment of money, an amount in dispute, and a demand for the issuance of a contracting officer's final decision, we conclude that appellant's proposal ripened into a claim.

Appellant is therefore entitled to be paid interest on the amount held allowable in this decision from 16 March 1981 until payment thereof or any portion thereof.

Cf. HSQ Technology, ASBCA No. 32272, 86-3 BCA ¶ 19,221 (prior history of disagreements over amounts due under contract showed that settlement proposal-upon being certified-was actually a disputed claim); also see J.M.T. Machine Company, Inc., ASBCA No. 29739, 86-1 BCA ¶ 18,684. No history (such as we found in HSQ Technology) is present in this case. The settlement proposal was submitted as the first step in the usual and

ordinary process following a termination for convenience.

The absence of such a transforming history also means that the prohibition of DAR 8-213.2(c) applies here. Cf. HSQ Technology, supra. Any notion that the DAR provision was merely a pre-CDA relic which the DAR Council had neglected to retire has been dispelled by the almost identical prohibition in FAR, supra, adopted long after the CDA was enacted. The regulation supports our conclusion that - at least when the Disputes clause in this contract is present - a termination for convenience settlement proposal is not ordinarily a CDA claim when submitted (whether certified or not). Subsequent actions are usually necessary for the matter to ripen into a claim. Racquette River Construction, Inc., supra.

No such effective actions occurred in this case. The belated labeling of the settlement proposal as a CDA claim by appellant's counsel and submission of a certifica-

tion in August 1982 contrast sharply with appellant's substantial concurrence with the auditor's findings made that same month and the large reduction in appellant's proposed settlement which followed. Except for the interest sought ($146,612.12), the settlement amount ultimately agreed upon ($438,346) was only $25,213.88 less than appellant's updated proposal in December 1984 ($610,172). Thus, aside from the interest issue introduced by appellant's counsel, the termination for convenience settlement proceeded to agreement without apparent dispute.

Appellant argues that the Disputes clause in this contract and the regulations upon which it was based are contrary to the clear mandates of the CDA that interest be paid on all claims. It points to the revised definition of claim in OFPP's 9 May 1980 policy letter (supra) as supporting its position that the settlement proposal, when certified, became a CDA claim.

Unlike FAR 49.112-2(d), supra, which expressly prohibits payment of interest on termination for convenience settlements, the revised regulation does not refer to settlement proposals expressly. Furthermore, the change to the definition of claim, inter alia, was described as a merely "technical change". (45 F.R. 31035)

Neither the legislative history of the CDA nor the administrative history of the implementing regulations speak clearly on whether CDA interest applies to a proposed settlement following a termination for convenience. Nor do we agree that the CDA itself is so clear that the Disputes clause in this contract and the regulations on which it was based are invalid. There is a time-honored presumption in favor of the validity of an administrative determination made pursuant to statute. Coleman v. Paccar, Inc., 424 U.S. 1301, 47 L. Ed. 2d 67 (1976); Trans Akaska Pipeline Rate cases, 436 U.S. 631, 56 L. Ed. 591 (1978). In promulgating

its interim regulation, the OFPP was acting pursuant to statute (41 U.S.C. 405a). And specifically applicable to whether interest is allowable is the long established principle that interest is not allowed against the Government unless Congress or a contract plainly authorizes it. This "entrenched immunity" is a part of sovereign immunity. Brookfield Construction Co. v. United States [29 CCF ¶ 81,878], 28 Ct. Cl. 551, 661 F.2d 159 (1981).

Neither this Board nor the United States Claims Court has been able to find that the CDA or the Disputes clause plainly authorizes payment of interest while the Government and contractor are in a pre-dispute, negotiation posture. Esprit Corp., Inc. v. United States [32 CCF ¶ 73,069], 6 Cl. Ct. 546 (1984), affirmed without discussion of this issue, Appeal No. 85-996 (unpublished) (Fed. Cir., July 30, 1985) 4 F.P.D. ¶ 36; Hoffman Construction Co. v. United States [32 CCF ¶ 73,279], 7 Cl. Ct. 518 (1985); Racquette

River Construction, Inc., supra; Fortec Constructors, ASBCA No. 27601, 83-1 BCA ¶ 16,402; Cf. J.M.T. Machine Company, Inc., ASBCA No. 29739, 86-1 BCA ¶ 18,684, motion for recon. den. 86-2 BCA ¶ 18,917.

However, we need not and do not decide whether, under the "new" (1980) Disputes clause, a dispute is a pre-condition to entitlement to CDA interest.

Moreover, as we have discussed previously, with regard to termination of convenience settlements specifically the DAR (and now FAR) prohibit such interest. Such regulations have the force and effect of law, and their mandates must be accorded the same respect as a congressional enactment. Paul v. United States [9 CCF ¶ 71,972], 371 U.S. 245, 9 L. Ed. 292 (1963).

We must respectfully disagree with the contrary view of the Engineer Board (R.G. Beer Corporation, ENG BCA No. 4885, 85-2 BCA ¶ 18,162; Barter Engineering Corporation, ENG BCA Nos. 4754, 4791, 85-3 BCA ¶ 18,342).

Other cases cited by appellant are either dictum (e.g., Tera Advanced Services Corp., GSBCA No. 7109, 85-2 BCA ¶ 17,941) or clearly involved disputed claims (e.g., Walber Construction Company, Inc., HUD BCA No. 80-445-C2, 83-2 BCA ¶ 16,885).

We conclude that appellant cannot recover interest under the CDA on the agreed settlement.

Our rejection of the claim for interest on the settlement amount also effectively disposes of appellant's claim for interest on unpaid interest. Even if we had sustained the basic interest claim, appellant would not be entitled to recover interest on interest. Central Mechanical, Inc., ASBCA No. 29193, 85-2 BCA ¶ 18,005; Sierracin/Sylmar, ASBCA No. 31179, 86-1 BCA ¶ 18,688, 3 January 1986.

The appeal is denied.

Dissenting Opinion of Administrative Judge Duvall

I dissent from the holding of the majority that the appellant cannot recover

interest on the agreed settlement because of the requirement in the interim Disputes clause utilized in the contract that the claimed amount must be disputed, and because a Defense Acquisition Regulation prohibited interest on termination for convenience settlement amounts. Section 12 of the CDA requires payment of interest on contractor claims. The Government cannot contravene the plain meaning of a statute by enforcing a contrary regulation or utilizing a Disputes clause that denies payment of interest by stretching the meaning of the word claim beyond the commonly accepted definition without the clear support of legislative history. Appellant is due interest on the settled amount from the date of contracting officer receipt of the letter identifying appellant's termination for convenience proposal as a claim under the CDA and transmitting a certification of the claim.

As the Board noted in J.M.T. Machine, ASBCA No. 29739, 86-1 BCA ¶ 18,684, disagree-

ment exists between and within the tribunals regarding the requirement for the existence of an antecedent dispute in order to have a "claim" under the CDA. Racquette River Construction, Inc., ASBCA No. 26846, 82-1 BCA ¶ 15,769; Esprit Corp., Inc. v. United States [32 CCF ¶ 73,069], 6 Cl. Ct. 546 (1984), aff'd by unpublished decision, Apeal No. 85-996 (Fed. Cir. July 30, 1985); Hoffman Construction Co. v. United States [32 CCF ¶ 73,279], 7 Cl. Ct. 518 (1985); Fortec Constructors, ASBCA No. 27601, 83-1 BCA ¶ 16,402; R.G. Beer Corporation, ENG BCA No. 4885, 85-2 BCA ¶ 18,162; Barter Engineering Corporation, ENG BCA Nos. 4754 and 4791, 85-3 BCA ¶ 18,342; Vepco, Inc., ASBCA No. 26993, on motion to dismiss, 82-2 BCA ¶ 15,824; R.G. Robbins Co. Inc., ASBCA No. 26521, on motion to dismiss, 82-1 BCA ¶ 15,643; Tera Advanced Services Corp., GSBCA No. 7109, 85-2 BCA ¶ 17,941.

The contradictory opinions expressed in Racquette River, followed by the majority,

and R.G. Beer illustrate the conflict over application of the interim clause and the meaning of the word claim in the CDA. The ASBCA held in Racquette River that no CDA claim exists where the contractor fails to meet the requirments of the clause, including the existence of a dispute. In R.G. Beer, the Corps of Engineers Board took a contrary position. It held that the definition in the interim Disputes clause is inoperative because it conflicts with the final OFPP regulations and accompanying clause which omitted the requirement for the existence of a dispute to have a claim, except in the case of invoices, vouchers, and other regular payments under the contract. The Corps Board concluded that the interim clause was contrary to the intent of Congress which was to provide interest on monies found due on contractor's claims whether settled or litigated, and to provide an incentive for early submission of claims.

The majority opinion ignores the fundamental precept that the starting point for interpreting a statute is the language itself. If the statutory language is clear, it is ordinarily conclusive. See Consumer Project Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The word "claim" as commonly used has a plain meaning. It is defined as "a demand for something rightfully or allegedly due; assertion of one's right to something." Webster's New World Dictionary (1968 edit.). I have found no other recognized authority on either common or legal usage applying the requirement of a dispute to the meaning of the word claim. Under case law, the conception of a claim against the Government normally connotes "a demand for money or for some transfer of public property" United States v. McNinch, 356 U.S. 595, 599 (1958). However, the word has been given special meaning in the context of particular statutes. Cf., John C. Grimberg Co., Inc. v. United States [30 CCF ¶ 70,884], 1 FPD 89

(CAFC 1983) (Claims Court jurisdiction over bid protests under the Federal Courts Improvement Act of 1982). In order to amend the common definition, e.g., require the existence of an antecedent dispute, the Board would have to find in the legislative history an intent on the part of Congress to give the term a special meaning in the context of Government contracting.

The history of Section 12, calling for payment of interest, offers no clear insight into the definition of the word "claim" as used in the CDA. As stated in the Senate Report, Section 12 executes recommendation 11 of the Commission on Government Procurement, established by Congress in 1969 to examine the existing procurement system. That recommendation was to "Pay interest on claims awarded by administrative and judicial forums." In making this recommendation, the commission noted in its 1972 report to Congress that the goals of the administrative and judicial processes are to reimburse the

successful party, and that these goals are frustrated if final payment of a judgment ignored long delays and losses resulting from a lengthy mandatory review procedure. The commission determined that without interest, the contractor would bear additional financial burdens as a result of such extended delays. The commission also stated that it believed payment of interest would serve as additional inducement to settle claims short of litigation, noting that:

> The prospect of agencies being required to pay interest on claims delayed by litigation encourages the agencies to avoid these payments by settling claims at an early stage and gives the contractor added bargaining power with the assurance of full payment if the claim is eventually paid.

While the report may be read as implying that the commission intended that interest be paid on disputed claims, any such intent, if it existed, was not carried out in the Senate

bill which, in final form, was adopted by both houses. The bill reported out of committees of the Senate (S3178) stated in Section 12 that "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the claim under Section 5 [now 6] accrues until payment ..." the Senate joint committee report on the legislation noted that the contractor's cost of financing required additional changed work uncompensated by progress payments was a legitimate business expense and stated that the interest section of the bill:

> ... provides interest to the contractor upon a favorable decision on his claim from the point in time the cause of action raises [arises] or the additional costs are incurred, whichever is later, to the date of payment following either a final decision of the agency board or a court of competent jurisdiction, or a settlement between the contractor and

the Government prior to a decision by the agency boards or the courts.

(S. Rep. No. 1118, 95th Cong., 2d Sess. 32 (1978)).

When the bill was presented on the floor, it was amended to provide for beginning interest when a claim was filed with the contracting officer. Sen. Robert Byrd explained that the change was deemed necessary to fix the actual starting date of interest, expressing concern that contractors might delay submission of claims, preventing early review and possible disposal of the claim. The amendment, according to the Senator, would "serve as an incentive for contractors to submit claims as soon as they are identified." (124 Cong. Rec. 36267 (1978)).

This history of the development of the interest requirement provides no basis for concluding that Congress intended to equate a claim with a dispute in the context of payment of interest. In fact, the evolution of the

actual language of Section 12 indicated a contrary intent. A claim could "accrue", i.e., the cause of action could arise or additional costs could be incurred with the contractor bearing the cost of financing the additional work, well before a disagreement between the parties existed. The Senate report indicates that Congress intended to compensate contractors for such financing costs. The last minute change in language to begin interest from the claim filing date does not affect this observation.

I also note that the Act itself (Pub. L. No. 95-563), while not defining the word claim, does not equate a claim with a dispute and suggests that they are not synonymous terms. Its preamble identified it as an Act "to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies." (Emphasis added) In two paragraphs, Sec 6(a) and 14(i), the CDA uses the word "claim" and "dispute" separated by the disjunctive "or".

However, some support can be found in the legislative history for the proposition that a dispute must exist in order to have a claim. The Senate Report, in outlining the purpose of the Act, stated:

> The Contract Disputes Act of 1978 provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. The Act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.

(S. Rep. at 1)

The Claims Court considered this language, and the Procurement Commission's intent to use interest as an incentive to the

Government to timely settle claims to avoid litigation, together with the established doctrine that waivers of sovereign immunity should be strictly construed, in concluding that a claim must be disputed and that Congress wanted interest to run against the Government only when the Government delayed in resolving disputes. Esprit Corp., supra.**

It is apparent that in conflicting opinions, Boards and the Claims Court have erred in attempting to divine a clear congressional mandate with respect to either the requirement or lack thereof for an antecedent disagreement in order to have a written re-

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**The facts in Esprit distinguish that case from this appeal. There the contractor claimed interest from the time of submission of requests for contract modifications that were not demands for specified sums of money and were not addressed to the contracting officer for decision under the Act. In affirming the Claims Court decision, the United States Court of Appeals for the Federal Circuit in an unpublished opinion determined that the "dispositive factor" was that the contractor failed to submit the types of claims called for in Sec. 6(a) of the Act. My opinion does not conflict with this determination.

quest for payment constitute a claim, although in my opinion the previously mentioned congressional intent to compensate contractors for financing costs and final language of the bill both weigh in favor of an intent to award interest on claims irrespective of the existence of a dispute. Absent a clear expression of intent in the legislative history to give the word claim a special meaning in the context of Government contract law, it should be given its plain meaning. There is no reason to create an ambiguity where none exists concerning the definition of the word claim as used in the Disputes Act. In the absence of ambiguity the doctrine of strict construction of waiver of sovereign immunity is not applicable here. The Act expressly provides for payment of interest on claims. Since the common definition of the word claim does not contain a requirement for an existing dispute, the requirement in the temporary Disputes clause used in this contract that the request for payment be in dispute in

order to constitute a CDA claim contravenes the plain meaning of the statute.

This defect in the definition of a claim was removed in the 1980 final OFPP regulation. I find it incongruous for the majority to rely on "a time honored presumption in favor of the validity of an administrative determination made pursuant to statute" in applying the temporary Disputes Clause claim definition to deny interest since that definition was changed to eliminate the element of a dispute from the definition in the final Disputes clause adopted after solicitation but prior to award of this contract. I note, as the Engineer Board did in R.G. Beer, that in 1982 the DAR Council proposed revisions to the Disputes clause which are set off in brackets in the language quoted below:

> (c)(1) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjust-

ment, or interpretation of contract terms, or other relief, arising under or relating to this contract [and disputed by the other party.] However, a written demand by the Contractor seeking the payment of money in excess of $50,000 is not a claim until certified in accordance with (d) below).

(2) A voucher, invoice, other routine request for payment [or other contract administration matter such as a change or settlement proposal] that is not in dispute when submitted is not a claim for the purpose of the Act. However, where such [contractor] submission is subsequently disputed [by the Contracting Officer] either as to liability or amount [or is] not acted upon in a reasonable time, [the contractor] may convert [it] to a claim pursuant to the Act by complying with the submission and certification requirements of this clause.

38 Federal Contracts Report 695 (Oct. 25, 1982)

The revisions were not adopted. In a letter to the DAR Council commenting on the proposals dated 28 January 1983, the OFPP objected to the changes, stating that they did not properly implement the Act, and that "The Act does not require that a claim be 'disputed by the other party', nor does it require that a claim be submitted under the Disputes clause." Government Contracts Reports, CCF, ¶ 92,682. I also find that the labelling of appellant's proposal as a claim under the CDA is an implicit demand for a contracting officer's decision. Luedtke Engineering Company, ENG BCA No. 4556, 82-2 BCA ¶ 15,851. The Board erred in applying the interim Disputes clause in Racquette River, and that decision should be overruled to the extent it addressed the issue of whether the settlement proposal was a claim for CDA interest purposes under the clause.

Since interest is due on this claim under the Contract Disputes Act, the regulation which prohibits interest on termination for convenience settlements contravenes the statute and does not apply. HSQ Technology, ASBCA 32272, 86-3 BCA ¶ 19,221; Walber Construction Company, Inc., HUD BCA No. 84-445-C2, 83-2 BCA ¶ 16,885.

Further, I conclude that appellant's termination for convenience proposal did not fall within the request for payment exception to the definition of a claim under either the FAR, as the contracting officer held in his final decision, or para (b)(ii) of the OFPP's final regulation. The exceptions to the definition of a claim are meant to apply to routine payment requests under the contract payments clause, such as progress payments, and not to requests for extraordinary payments, including termination for convenience settlement proposals. This view is buttressed by the above mentioned failure to adopt the clause changes proposed by the DAR Council in

1982. I note in this connection that the Termination for Convenience clause as well as standard equitable adjustment clauses call such requests for payment "claims".

I agree with the majority that appellant is not entitled to interest on unpaid interest. Such an award would be contrary to the Board's decision in Central Mechanical, Inc., ASBCA No. 29193, 85-2 BCA ¶ 18.005. In denying such a claim the Board there noted the general rule that where a statute requires the payment of interest, only simple interest can be awarded against the Government. The Board cited Brookfield Construction Co. v. United States [29 CCF ¶ 81,878], 661 F.2d 159, 170 (Ct. Cl. 1981), where the Court of Claims expressed the view that there is no support for the award of compound interest rather than simple interest under the CDA. Appellant has given us no sound reason for overturning our decision in Central Mechanical.

Relevant Portions of OFPP Interim Regulations, 44 Fed. Reg. 12519-12524 (1979):

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS AND RELATED REGULATIONS

Interim Final Rules

February 26, 1979

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget.

ACTION: Notice of Interim Final Uniform Rules of Procedure for Boards of Contract Appeals and related regulations.

SUMMARY: This document sets out the text of interim rules which boards of contract appeals must adopt as well as rules which the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration must incorporate in their procurement regulations.

On November 1, 1978, the President signed into law Pub. L. 95-563, the "Contract Disputes Act of 1978." That Act, among other things requires changes to the Rules of

Procedure currently in use by the Boards of Contract Appeals of the procuring agencies, as well as certain other changes in contract clauses and procurement regulations by March 1, 1979. Proposed Rules of Procedure and related regulations were published for comment in the January 25, 1979, FEDERAL REGISTER. The Interim final Rules and regulations set forth below incorporate the changes required by Pub. L. 95-563, and reflect many of the comments received on the proposed Rules and regulations. Some of the changes to the Rules and regulations made as a result of comments received are significant. These Rules and regulations are therefore issued as implementation of Pub. L. 95-563, effective on March 1, 1979, on an interim basis, and will automatically become final on June 1, 1979 unless changed before that time. This will enable the Office of Federal Procurement Policy to evaluate additional comments on the Interim Rules and regulations.

The Rules of Procedure are to be adopted uniformly by all Boards of Contract Appeals.

* * * *

5. Payment of Interest on Contractor's Claims. The Government shall pay interest on contractor's claims as prescribed in paragraph (d) of the Disputes Clause.

II. Disputes Clause.

1. Sections 7-103.12 and 7-602-6 of the Defense Acquisition Regulation and Sections 1-7.102-12 and 1-7.602-6 of the Federal Procurement Regulations are amended to provide as follows:

The Contracting Officer shall insert the following clause in all contracts unless exempted by the head of the agency under 41 U.S.C. 603(c).

Disputes. (a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.). If a dispute arises relating to the contract, the contractor may submit a claim to the Contracting Officer who shall issue a written decision on the dispute

in the manner specified in DAR 1-314 (FPR 1-1.318).

(b) "Claim" means:

(1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of contract terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the Contractor shall certify, at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested

accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(Contractor's Name) _____

(Title) _____

(d) The Government shall pay the contractor interest:

(1) on the amount found due on claims submitted under this clause;

(2) at the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41;

(3) from the date the Contracting Officer receives the claim, until the Government makes payment.

(e) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(f) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer

(End of Clause)

* * * *

Relevant Portions of OFPP Policy Letter 80-3, Final Regulations, 45 Fed. Reg. 31035-31037 (1980):

Final Contract Disputes Regulatory Coverage and Contract Disputes Clause

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Policy Directive.

SUMMARY: This policy directive sets forth amendments to be made to the Federal Procurement Regulations (FPR), the Defense Acquisition Regulations (DAR), and the National Aeronautics Procurement Regulations (NASAPR) relating to contract disputes regulatory coverage and the contract dispute clause.

* * * *

The final Disputes clause and regulations also provide technical changes from the interim clause and regulations with regard to payment of interest, procedures for certification of a claim exceeding $50,000, and other areas. These changes are made to better

reflect the intent of the Contract Disputes Act.

* * * *

OFPP Policy Letter 80-3

To the Heads of Executive Departments and Establishments

Subject: Regulatory Guidance on Pub. L. 95-563, the Contract Disputes Act of 1978

There is a need in Government for uniformity and consistency in the application of procurement policy. This directive provides the uniform policy applicable to the Contract Disputes Act of 1978. The clauses and regulatory coverage that follow articulate this uniform policy. The Defense Acquisition Regulation (DAR), the Federal Procurement Regulations (FPR), and the National Aeronautics and Space Administration Procurement Regulations (NASA PR) shall be amended to conform to this policy. This guidance supersedes in its entirety the guidelines previously published in the Federal Register,

on March 7, 1979 (44 FR 12519), and June 14, 1979 (44 FR 24228).

I. Regulatory Coverage-Resolution of Claims

1. Contract Disputes Act of 1978:

(a) General. The Contract Disputes Act of 1978 (Pub. L. 95-563, 41 U.S.C. 601-613) establishes procedures and requirements for asserting and resolving claims by or against contractors relating to a contract subject to the Act. In addition, the Act provides for the payment of interest on contractor claims, for the certification of contract claims in excess of $50,000, and a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

(b) Definition of Claim:

(i) As used herein "claim" means a written demand by one of the contracting parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim under Section 6(a) of the Act as provided in Section 3, below.

(c) Government Policy on Settlement by Mutual Agreement. It is the Government's policy, consistent with the Act, to try to resolve all claims by mutual agreement at the contracting officer's level, without litigation. Implementation of this policy depends on an open mind with regard to the matter in dispute and the adequacy of the information provided in support of the claim by both the contractor and the Government. In appropriate circumstances, before issuance of a contracting officer's decision on a claim, informal discussions between the parties, to the extent feasible, by individuals

who have not participated substantially in the matter in dispute, can aid in the resolution of differences by mutual agreement and should be considered.

* * * *

3. Initiation of a Claim-Except as provided in the Act, (a) contractor claims shall be made in writing and submitted to the contracting officer for a decision, and (b) claims by the Government against a contractor shall be the subject of a contracting officer decision.

4. Contracting Officer's Decision:

(a) When a claim by or against a contractor cannot be satisfied or settled by agreement and a decision on the claim is necessary, the Contracting Officer shall:

(i) Review the facts pertinent to the claim;

(ii) Secure assistance from legal and other advisors; and

(iii) Coordinate with the contract administration office or Contracting Office when appropriate.

* * * *

5. Payment of Interest on Contractor's Claims-The Government shall pay interest on a contractor claim on the amount found due and unpaid, from the date the Contracting Officer receives the claim until the date payment is made, at the rates fixed by the Secretary of the Treasury pursuant to the Renegotiation Act, Pub. L. 92-41.

6. Disputes Clause:

(a) The Act applies to all disputes with respect to contracting officer decisions on matters arising out of or relating to a contract. Agency Boards of Contract Appeals (BCA) created under the Act have the same jurisdiction as the Court of Claims with respect to a claim that is subject to the Act. Thus, the statutory agency BCAs continue to have all of the authority they possessed before the Act with respect to

disputes arising under a contract, as well as authority to decide disputes relating to a contract. The Disputes clause set forth in Part II recognizes the all disputes authority established by the Act, and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. It is not intended to affect the rights and obligations of the parties as provided by the Act, nor to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals pursuant to the Act.

* * * *

II. Contract Disputes Clause

The following clause shall be included in all contracts subject to the contract Disputes Act unless (1) exempted by the head of the Agency under 41 U.S.C. 603(c), or (2) modified in accordance with DAR 1-314 or FPR 1-1.318:

Disputes Clause:

(a) This Contract is subject to the Contract Disputes Act of 1978 (Pub. L. 85-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c)(i) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim pursuant to the Act.

(iii) A claim by the contractor shall be made in writing and submitted to the contracting officer for decision. A claim by the Government against the contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the

contractor having overall responsibility for the conduct of the contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must render a decision within 60 days. For contractor claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

(g) The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.

(h) Interest on the amount found due on a contractor claim shall be paid from the date the claim is received by the Contracting Officer until the date of payment.

(i) Except as the parties may otherwise agree, pending final resolution of a claim by

the contractor arising under the contract, the contractor shall proceed diligently with the performance of the contract in accordance with the contracting officer's decision.

* * * *

Supreme Court, U.S.
FILED
NOV 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-423

In the Supreme Court of the United States

OCTOBER TERM, 1988

MAYFAIR CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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Statutes and regulations:	
Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*	2, 4
41 U.S.C. 611	4
44 Fed. Reg. 12524 (1979)	1
45 Fed. Reg. (1980):	
p. 31035	5
p. 31037	5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-423

MAYFAIR CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a construction company, seeks review of the court of appeals' decision affirming the determination of the Armed Services Board of Contract Appeals that petitioner was not entitled to interest on the sum contained in a settlement proposal.

1. In September 1980, the Department of the Air Force awarded a contract to petitioner in the amount of $4,176,296 for the "Pacer Down" facilities restoration project at McConnell Air Force Base, Kansas. The contract contained a disputes clause that incorporated by reference the March 1979 version of the Defense Acquisition Regulation Disputes Clause.[1] In January 1982, the

[1] Defense Acquisition Regulation (DAR) 7-602.6(b) (Disputes) (1979) contained the following definition of "claim" (44 Fed. Reg. 12524 (1979)):

(1) a written request submitted to the Contracting Officer;

contracting officer terminated the contract for the convenience of the government. Petitioner, in June 1982, sent a letter to the contracting officer containing a "termination settlement proposal" in the amount of $990,937.29. Two months later, petitioner sent a second letter to the contracting officer denominating the earlier settlement proposal as a "claim" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*; petitioner also enclosed a "certification" of the proposal as a claim. In June and August 1984, petitioner submitted certified updates to the settlement proposal, both of which tendered settlement costs less than the original settlement offer of $990,937.29. Pet. App. 3-5, 46.

In December 1984, petitioner submitted an updated termination settlement proposal in the amount of $610,172, and certified this latest proposal as a claim under the CDA. In that proposal, petitioner included a request for $146,612.12 in interest, which petitioner designated as an element of its settlement expenses. Ultimately, in February 1985, petitioner and the government entered into Termination Supplemental Agreement No. A00001. Under that agreement, the government paid petitioner the undisputed amount of $438,346 for its termination costs; the agreement expressly reserved petitioner's demand for interest. The contracting officer, however, denied petitioner's interest demand, concluding that the settlement proposal and its various updated versions were not "claims" as defined by the applicable regulations incorporated in the original contract. Pet. App. 4-5, 46-48.

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(2) for payment of money, adjustment of contract terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

2. Petitioner appealed the contracting officer's decision to the Armed Services Board of Contract Appeals (Board). The Board determined that the Disputes Clause of the contract defined "claim" to require the existence of a dispute. The Board found that "[e]xcept for the interest sought ($146,612.12), the settlement amount ultimately agreed upon ($438,346) was only $25,213.88 less than [petitioner's] updated proposal in December 1984 ($610,172). Thus, aside from the interest issue introduced by [petitioner] counsel, the termination for convenience settlement proceeded to agreement without apparent dispute" (Pet. App. 62). Given the absence of the requisite dispute, the Board concluded that no "claim" existed. Accordingly, the Board held that petitioner was not entitled to interest and denied petitioner's appeal. Pet. App. 5, 61-66.

3. The court of appeals affirmed. The court concluded that substantial evidence supported the Board's factual finding that no dispute existed between petitioner and the government. Moreover, under the controlling disputes clause in the contract, "no claim exists unless it involves a dispute" (Pet. App. 6). Accordingly, petitioner was not entitled to interest because its termination settlement proposal did not constitute a claim under the contract. Pet. App. 6-8.[2]

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[2] Because the contract itself resolved petitioner's request for interest, the court of appeals did not address petitioner's contention that the CDA does not require that a "claim" involve a disputed matter (Pet. App. 9-10).

Judge Bennett dissented. He first disagreed with the Board's conclusion that there was no "dispute." In his view, the record showed that the parties had substantial disagreements. Pet. App. 12-15. Judge Bennett also concluded that the CDA does not require a "claim" to be disputed and that the parties, by contractual provisions, should not be able to "sidestep[ ]" (Pet. App. 23) Congress's intention of permitting contractors to recover interest (Pet. App. 15-29).

4. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

a. The CDA provides for the payment of interest on "claims" due contractors (41 U.S.C. 611), but does not define the meaning of a "claim" for these purposes. See 41 U.S.C. 601 ("Definitions"). Petitioner contends (Pet. 8-11), nevertheless, that the CDA mandates a definition of claims that includes—and thus requires the payment of interest on all contract settlements, regardless of whether any issues are in dispute. But petitioner points to nothing in either the language or the legislative history of the CDA to suggest that Congress specifically intended to require such a definition of a claim. The 1979 Defense Acquisition Regulation defining claims more narrowly to include only matters that are in dispute was therefore entirely consistent with the statute, and thus was entitled to judicial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In any event, as the court of appeals made clear (Pet. App. 9 n.*), petitioner's request for interest was governed by a disputes clause incorporated by the parties into the contractual provision that controlled the transaction. As the court of appeals correctly pointed out (Pet. App. 9-10), under these circumstances it was irrelevant whether the CDA implicitly adopts a broader definition of a claim, because "this would not mean that the CDA *prohibits* the parties from agreeing to such a requirement, and there is nothing in the language of the CDA to suggest such a prohibition" (*ibid.* (emphasis in original)). Accordingly, given the express terms of petitioner's contract, the court of appeals correctly concluded that petitioner's settlement proposals were not "claims" requiring payment of interest.[3]

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[3] Petitioner does not challenge the court of appeals' upholding of

b. In any event, the court of appeals' resolution of that narrow issue has no prospective importance. The contract clause contested in this case, Defense Acquisition Regulation (DAR) 7-602.6(b) (Disputes) (1979), was superseded by a clause issued on April 30, 1980, which applied to solicitations issued on or after June 1, 1980. The 1980 regulation does not contain the requirement which the court of appeals found to be dispositive, namely, that a "claim" must involve a matter in dispute. 45 Fed. Reg. 31035-31037 (1980); see Pet. App. 8-9, 90-100. The court of appeals' decision accordingly concerns what is at most a problem of diminishing importance and thus does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

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the Board's factual finding that petitioner's settlement was not a "disputed" claim.

☆ U.S. GOVERNMENT PRINTING OFFICE 1988—241-699/60753